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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 735

RIVOLI TRUCKING CORPORATION

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Prior to December 31, 1953, truck loading and unloading at the Port of Greater New York was done by public loaders. This system was abolished by the New York-New Jersey Waterfront Commission Compact, approved by Act of August 12, 1953, 67 Stat. 541, which provides, in pertinent part:

> [T]hat the function of loading and unloading trucks and other land vehicles at the piers and other waterfront terminals can and should be performed, as in every other major American port,

> without the evils and abuses of the public loader system, and by the carriers of freight by water, stevedores and operators of such piers and other waterfront terminals or the operators of such trucks or other land vehicles.

In 1955, in accordance with the Compact and pursuant to Section 15 of the Shipping Act (39 Stat. 733, 46 U.S.C. 814), the Federal Maritime Board (now the Federal Maritime Commission) approved Agreement No. 8005, which authorized the marine terminal operators in the Port of New York "to load or unload waterborne freight onto or from vehicles at piers or at other waterfront terminals in the Port of Greater New York and vicinity, for a fee or other compensation, under the provisions and subject to the requirements of Public Law 252—83rd Congress * * *."[1]

Petitioner, a trucking company, objects to the requirement that loading operations be performed by the terminal operators. It first sought treble damages under the antitrust laws on the ground that certain marine carriers, terminal operators and stevedores were conspiring to prevent petitioner from performing its business of loading. The district court dismissed the suit, holding that if the allegations of the complaint were true they would constitute violations of the Shipping Act, over which the Federal Maritime Board had primary jurisdiction. *Rivoli Trucking Corp.* v. *New York Shipping Ass'n*, 167 F. Supp.

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[1] The foregoing account is derived from *Empire State Highway Transp. Ass'n* v. *American Export Lines*, 5 F.M.B. 565.

940 (S.D.N.Y.) A motion for leave to file an amended and supplemental complaint was denied. 167 F. Supp. 943 (S.D.N.Y.).

Meanwhile, in 1956, petitioner filed with the Federal Maritime Board a complaint alleging that the terminal charges and practices of the New York Shipping Association and others violated the Shipping Act. In 1957, petitioner filed with the Board a second complaint against the same respondents, alleging that the charges for use of and access to their facilities violated the Shipping Act. Both complaints were dismissed for lack of prosecution in 1959.[2]

While the complaints before the Board were pending, petitioner brought suit in the district court against 36 terminal operators, alleging that they had refused to accept freight unless petitioner paid a "mandatory fee" and that they had refused to permit petitioner to load its trucks unless it paid a loading fee. The complaint alleged that the cause of action arose under the Waterfront Commission Compact. The district court held that the allegations, if true, constituted violations of the Shipping Act, which were within the primary jurisdiction of the Federal Maritime Board. *Rivoli Trucking Corp.* v. *American Export Lines*, 167 F. Supp. 937 (E.D.N.Y.).[3]

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[2] App. 8-9.

[3] Petitioner also sued to enjoin the enforcement of concededly valid tax liens until the Federal Maritime Board had acted on petitioner's complaints. This complaint was dismissed. *Rivoli Trucking Corp.* v. *Scanlon*, 162 F. Supp. 53 (E.D.N.Y.). Although petitioner did not appeal from this judgment, it seeks to raise the same issue in this Court (Pet. 8). Plainly, the issue has no place in the present case.

Petitioner then sued the United States in the district court under 28 U.S.C. 1346(a)(1) to recover an amount allegedly illegally assessed by the Federal Maritime Board as, in effect, a tax. The complaint was dismissed in an unreported opinion (S.D.N.Y., 62 Civ. 2484, October 4, 1962). Petitioner moved to amend that complaint to include a tort claim for misrepresentation. The motion was denied in an unreported opinion (S.D.N.Y., 62 Civ. 2484, February 8, 1963). Without taking an appeal, petitioner asked the court of appeals to vacate the judgment of dismissal; the motion was denied. Petitioner moved to re-open the judgment and for the award of just compensation for property taken. These motions were denied in an unreported opinion (S.D.N.Y., 62 Civ. 2484, May 28, 1963).[4]

Petitioner brought suit next in the State courts. Six of the eight causes of action were dismissed on the ground that the court lacked jurisdiction to vindicate rights under the Shipping Act which the Federal Maritime Board had primary jurisdiction. Causes of action alleging conversion and destruction of petitioner's property, which the court described as "insufficiently pleaded and * * * vague, indefinite and uncertain," were dismissed with leave to serve an amended complaint. Petitioner apparently never pursued this opportunity. *Rivoli Trucking Corp.* v. *American Export Lines*, 17 Misc. 2d 569, 573, 185 N.Y.S. 2d 684, 689 (Sup. Ct.).

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[4] The three unreported opinions are included in the Appendix to the Government's motion for summary judgment in the Court of Claims.

Finally, petitioner brought the present suit sounding in contract in the district court, which, because of the amount involved, transferred the case to the Court of Claims. 221 F. Supp. 532 (S.D.N.Y.).

The Court of Claims was clearly right in dismissing the petition. It is obvious from the foregoing that the present suit is simply the latest in a series in which petitioner has attempted to avoid the initial determination that its remedy lay with the Federal Maritime Board and to fashion its own remedy in the courts. This most recent attempt is wholly without foundation. Petitioner had no contract with the Maritime Board. It performed no work at the behest or for the benefit of the Board. As the uncontradicted affidavit before the Court of Claims showed, the Board never requested or demanded that petitioner perform services or furnish goods to it, and never "had any commercial dealings of any nature" with petitioner (App. 6-7).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

SHERMAN L. COHN,
FLORENCE WAGMAN ROISMAN,
Attorneys.

DECEMBER 1964

APPENDIX

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Washington, D. C.) ss
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AFFIDAVIT

Thomas Lisi, being duly sworn, deposes and says:

1. I am the Secretary of the Federal Maritime Commission and, as such, I am the custodian of the official records of the Commission.

2. I was the Secretary of the Federal Maritime Board from October 3, 1960, until it was succeeded by the Federal Maritime Commission under the provisions of Reorganization Plan No. 7 of 1961, H. Doc. 187, 87th Cong., 1st session.

3. The functions of the Federal Maritime Board were prescribed in Reorganization Plan No. 21 of 1950 (64 Stat. 1273). The Board was charged with the investigation, regulation and control of rates, fares, charges, classifications, tariffs, regulations, and practices of common carriers by water under the provisions of the Shipping Act, 1916; the Intercoastal Shipping Act, 1933; and the Merchant Marine Act, 1920. The Board was also charged with the administration of the program of government subsidizing of certain carriers.

4. The Board, in the performance of its statutory functions, never found it necessary to own trucks, or to charter them from Rivoli Trucking Corporation, or from any other source; and, in fact, never owned or chartered trucks.

5. The Board's dealings with Rivoli Trucking Corporation were confined to the occasions when the said Rivoli Trucking Corportion appeared before it as a

litigant in Board proceedings. The Board at no time requested, demanded or ordered the Rivoli Trucking Corporation to perform work, labor and services; and at no time has the Federal Maritime Board or the Federal Maritime Commission had any commercial dealings of any nature whatsoever with Rivoli Trucking Corporation.

6. There is not now, nor has there ever been any amount due or owing to the Rivoli Trucking Corporation from the Federal Maritime Board or the Federal Maritime Commission.

/s/ Thomas Lisi
THOMAS LISI
Secretary

My Commission Expires May 31, 1967.

Subscribed and Sworn to before me this 24th day of July, 1963.

/s/ Ruth May Burroughs
Notary Public

)
Washington, D. C.) ss
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AFFIDAVIT

Thomas Lisi, being duly sworn, deposes and says:

1. I am the Secretary of the Federal Maritime Commission and, as such, I am the custodian of the official records of the Commission.

2. I was the Secretary of the Federal Maritime Board from October 3, 1960, until it was succeeded by the Federal Maritime Commission under the provisions of Reorganization Plan No. 7 of 1961, H. Doc. 187, 87th Cong., 1st session.

3. There is nothing in the official records of the Federal Maritime Board or of the Federal Maritime Commission that indicates that the Federal Maritime Board ever levied, or attempted to levy, or assessed, charged, or collected, or attempted to assess, charge, or collect any tax in connection with the Rivoli Trucking Corporation, or any other person, association, or corporation whatsoever.

4. On March 23, 1955, the Federal Maritime Board approved an agreement, No. 8005, pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. § 814, authorizing certain terminal operators and common carriers by water to assess and collect specified terminal charges in the port of New York, New York. By report and order served March 12, 1959, the Federal Maritime Board approved a modification to Agreement No. 8005, namely Agreement No. 8005-1. A copy of the above-mentioned report, order and agreements are attached hereto.

5. On October 15, 1956, the Rivoli Trucking Corporation filed a complaint against the New York

Shipping Association et al., with the Federal Maritime Board, alleging that the respondents' terminal charges and practices were in violation of the Shipping Act, 1916, 46 U.S.C. § 801 *et seq.* The complaint was assigned Docket No. 803. By order served July 10, 1959, the complaint was dismissed for lack of prosecution.

6. On February 26, 1957, the Rivoli Trucking Corporation filed another complaint against the New York Shipping Association et al. alleging that the respondents' charges for the use and access to their terminals, docks, piers, and wharves were in violation of the Shipping Act, 1916. That complaint was assigned Docket No. 814. By order served on April 24, 1959, the complaint was dismissed for lack of prosecution.

/s/ Thomas Lisi
THOMAS LISI

Subscribed and Sworn to before me this 15 day of August, 1962

/s/ Ruth May Burroughs
Notary Public

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